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THE GOVERNMENT OF INDIA

v.

PETROCON INDIA LTD

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HIGH COURT MALAYA, KUALA LUMPUR
ALIZATUL KHAIR OSMAN J
[CIVIL SUIT NO: R4(2)-25-86-2005]
15 JUNE 2012

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ARBITRATION: *Award - Setting aside - Decision of arbitral tribunal - Partial award - Respondent granted leave to set aside partial award - Kuala Lumpur (KL) designated as juridical seat of arbitration - Whether juridical seat of arbitration had been shifted from KL to London by consent of parties - Whether respondent estopped by its own conduct from*

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denying that seat of arbitration had been shifted to London - Leave to serve motion out of jurisdiction - Whether ought to have been granted

The Government of India ('the respondent'), Petrocon India Ltd ('the applicant') and three other parties entered into a production

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sharing contract ('the PSC') in respect of the development of petroleum resources in an area in India. When disputes arose between the parties, arbitration proceedings were commenced pursuant to the terms of the PSC. An arbitral tribunal was duly constituted with Kuala Lumpur ('KL') as the juridical seat for

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arbitration as expressly stated in the PSC. However, the arbitral tribunal was of the view that the arbitration ought not to be heard in KL due to the SARS scare at that time. By way of a consent order, the arbitral tribunal ordered that the seat of the arbitration was to be shifted to London. At the close of the arbitral hearing

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in London, the arbitral tribunal made a partial award. The respondent then obtained leave to file a motion to set aside the partial award and leave to serve the motion out of the jurisdiction. Hence, the applicant applied to set aside the respondent's said motion on the grounds that this court lacked the jurisdiction to

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hear the motion. It was the applicant's case that if the partial award that the respondent was seeking to set aside had been made in KL, then the court had the jurisdiction to hear the respondent's application but since the seat of arbitration had shifted from KL to London, the court would not have the

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necessary jurisdiction to adjudicate on a matter in relation to that arbitration. On the other hand, the respondent argued that the seat or arbitration was in KL and remained in KL and as such, the partial award was deemed to have been made in KL. The

applicant further submitted that by participating in the arbitration proceedings after the consent order was made and by sharing in the costs of the arbitration without protest or comments, the respondent was estopped by its conduct from denying that it had agreed for the seat of arbitration to be shifted to London.

Held (allowing applicant's application with costs):

(1) The agreement, which was recorded in the form of a written consent order of the arbitral tribunal, had shifted the seat of the arbitration to London. The consent order was in line with the requirements of s. 3(a) and (c) of the English Arbitration Act 1996 ('EAA'), which is the governing law of the arbitration agreement. Thus, based on the consent order and by virtue of s. 3 of the EAA, the applicant and respondent had agreed to change the seat of the arbitration from KL to London. As such, no arbitration proceedings were held in KL and this matter did not fall within either s. 23(1)(a) or (c) of the Courts of Judicature Act 1964. Therefore, this court had no jurisdiction to adjudicate or decide on any of the prayers sought by the respondent in its motion. Any challenge to the partial award ought to be filed before the competent courts in England. (paras 86, 89, 92, 100, 126 & 129)

(2) The consent order had referred to the word 'seat', indicating that the intention of the parties was to move the juridical *situs* or juridical seat of the arbitration. The arbitral tribunal, which was made up of three eminent retired judges, and the respondent, who was advised by counsel at all times, would have been fully aware of the effect and meaning of the words 'consent order', 'seat' and 'shifted'. Further, the respondent failed to make any protest about the fact that the consent order stated that the seat of the arbitration had been shifted to London, during the arbitration hearings or at any material time. In the circumstances, the respondent was estopped by its own conduct from denying that the seat of arbitration had been shifted to London. (paras 96, 97, 98 & 120)

(3) The respondent's argument that an amendment of the arbitration agreement would have to follow the procedure as set out in art. 35.2 of the PSC was flawed. An arbitration agreement was a separate and distinct agreement which could provide for its own procedure and amendment. In any case, art. 35.2 of the PSC would only apply if the terms of the PSC itself were being amended. Since the amendment in the

present case concerned the change of venue of the arbitration proceeding, which was not an amendment of the terms of the PSC itself, art. 35.2 of the PSC would not apply. Instead, the appropriate article would be art. 34.12 of the PSC, which had clearly provided a mechanism to or procedure whereby the parties to an arbitration could agree to change the juridical seat of arbitration. (paras 106, 107, 110 & 117)

(4) Leave to serve the respondent's motion out of the jurisdiction was permissible only if the arbitration to which the motion related to had been held in KL. As no arbitration proceedings were held in KL, leave to serve the motion out of the jurisdiction ought not to have been granted. (paras 129 & 131)

Case(s) referred to:

Abuakwa v. Adanse [1957] 3 All ER 559 ***(refd)***

Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15 SC ***(refd)***

Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation [1981] 1 All ER 289 ***(refd)***

Chong Fook Kam & Anor v. Shaaban & Ors [1970] 1 LNS 16 FC ***(refd)***

CVD [2000] EWHC 154 ***(refd)***

Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc [2006] 1 QBD 65 ***(refd)***

Heyman v. Darwins Ltd [1942] AC 356 ***(refd)***

Hong Leong Leasing Sdn Bhd v. Tan Kim Cheong [1993] 1 LNS 110 HC ***(refd)***

Karaha Bodas Co LLC v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (No. 2) [2003] 4 HKC 488 ***(refd)***

Kinch v. Walcott & Ors [1929] AC 482 ***(refd)***

Mulamchand v. State of Madhya Pradesh AIR 1968 SC 1218 ***(refd)***

Naviera Amazonica Peruana SA v. Compania Internacional De Seguros De Peru [1988] 1 Lloyd's Rep 116 ***(refd)***

Peyman v. Lanjani and Others [1984] 3 All ER 703 ***(refd)***

State of Haryana v. Lal Chand & Ors [1984] 3 SCR 715 ***(refd)***

Sumitomo Heavy Industries v. ONGC Ltd And Others [1998] 1 SCC 305 ***(refd)***

Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission [1994] 1 Lloyd's Rep 45 ***(refd)***

Toh Seak Keng v. Lim Huang Cheow & Ors, Toh Seow Ngan & Ors As Interveners; & Another Case [1989] 2 CLJ 511; [1989] 2 CLJ (Rep) 580 HC ***(refd)***

Transocean Shipping Agency (P) Ltd v. Black Sea Shipping And Others AIR 1998 SC 707 ***(refd)***
Union of India v. McDonnell Douglas [1993] 2 Lloyd's Rep 48 ***(refd)***
Wilding v. Sanderson [1897] 2 Ch 534 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)(a), (b), (c), (d)
Rules of the High Court 1980, O. 69 r. 5

Arbitration Act 1996 [UK], ss. 3(a), (c), 7
Constitution of India [Ind], art. 299

Other source(s) referred to:
Redfern and Hunter, *Law and Practice of Commercial Arbitration*, 4th edn, p 78
Sutton and Gill, *Russell on Arbitration*, 22nd edn, pp 9 & 73

For the appellant - M/s Shearn Delamore & Co
For the respondent - M/s Skrine

Reported by Vani Krishnan

JUDGMENT

Alizatul Khair Osman J:

[1] This is an application by the respondent, Petrocon India Limited *vide* notice of motion dated 1 June 2006 (encl. 9) to, *inter alia*, set aside the applicant, the Government of India's notice of originating motion dated 10 May 2005 (encl. (1)) and further, to set aside the service of encl. (1) on the respondent.

[2] For the purpose of this application, the respondent, Petrocon India Limited will be referred to as the applicant and the applicant in encl. (1), ie, the Government of India will be referred to as the respondent.

[3] The grounds in support of the application are as follows:

(a) the partial award made pursuant to the arbitration between the applicant and the respondent was not made within the local jurisdiction of the High Court of Malaya.

(b) the seat of the arbitration between the applicant and the respondent is in London.

(c) the High Court of Malaya has no jurisdiction to entertain or adjudicate or decide on any of the prayers sought by the applicant in the originating motion.

(d) the arbitration to which the originating motion relates is being held in London and not within the jurisdiction of the High Court of Malaya.

Background

[4] The respondent and the applicant were parties to a Production Sharing Contract dated 28 October 1994 ("the PSC").

[5] There were three other parties to the PSC and they were the Oil & Natural Gas Corporation Limited ("ONGC"), Cairn Energy India Private Limited ("Cairn Energy") and Ravva Oil (Singapore) Pte Limited ("Ravva Oil").

[6] The PSC was in respect of the development of petroleum resources in an area in India known as the Ravva Oil and Gas Field.

[7] Disputes arose between the respondent and the applicant in respect of the PSC and pursuant to the terms of the PSC, the applicant issued three notices to arbitrate dated 19 August 2002, 9 September 2001 and 30 July 2003 to the respondent. These notices to arbitrate are exhibited collectively as exh. MS3 in encl. (2).

[8] An arbitral tribunal was constituted and arbitration proceedings commenced. Upon hearing the parties, the arbitral tribunal published their partial award dated 31 March 2005, which is the subject matter of the respondent's originating motion. The said partial award is exhibited as exh. MS7 encl. (2).

[9] On 10 May 2005 the respondent filed the originating motion (encl. 1) for an order that parts of the partial award dated 31 March 2005 be set aside or alternatively for an order that those parts be remitted back to the arbitral tribunal for reconsideration.

[10] On 27 September 2005, the respondent obtained leave to serve encl. (1) out of the jurisdiction. On 1 June 2006, the applicant filed this application (encl. 9) to set aside encl. (1), leave to serve out of the jurisdiction and service of encl. (1).

Main Issue

[11] The thrust of the applicant's application is that this court lacks the jurisdiction to hear the respondent's originating motion to set aside the partial award in encl. (1) as the seat of arbitration has shifted from Kuala Lumpur to London.

[12] In order for the court to determine whether it has the jurisdiction to hear encl. (1), the court will have to decide whether the seat of arbitration has in fact shifted from Kuala Lumpur to London. This is so because both parties do not dispute that the seat of the arbitration will determine the jurisdiction of the court to hear matters pertaining to the partial award.

[13] The main issue before the court therefore is whether the seat has in fact shifted to London.

[14] Before determining this issue, it is perhaps necessary to set out the jurisdiction of this court to hear civil proceedings.

Jurisdiction Of The High Court Of Malaya

[15] It is not disputed that the High Court of Malaya (the High Court) derives its jurisdiction from s. 23 of the Courts of Judicature Act 1964 ('CJA') which lays down four circumstances under which the High Court of Malaya has jurisdiction to try civil proceedings. They are:

> 23. **Civil Jurisdiction - general**
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> (1) Subject to the limitations contained in Article 128 of the Constitution, the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership of which is disputed is situated
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> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[16] As far as s. 23 of the CJA is concerned both parties agree with the following propositions:

(i) That sub-paragraphs s. 23(1)(a)-(d) are to be read disjunctively in that the respondent need only fulfill one of the four limbs of (a)-(d) of s. 23(1) for this court to be seised of jurisdiction;

(ii) Limbs (d) and (b) do not apply to the present proceedings;

(iii) This court would have jurisdiction if:

(a) the cause of action arose within the jurisdiction of the court (ie, limb (a) of s. 23(1) of the CJA); or

(b) the facts on which the proceedings are based exist or are alleged to have occurred within the jurisdiction of the court (limb (c) of s. 23(1) of the CJA).

[17] In other words, as submitted by learned counsel for the applicant, if the partial award that the respondent is seeking to set aside had been made in Kuala Lumpur, in that the arbitration to which it relates was held in Kuala Lumpur, then the court can be said to have jurisdiction to hear the respondent's application either because the cause of action arose in Kuala Lumpur or because the facts on which the proceedings are based (ie, the arbitration) exist or occurred within the local jurisdiction of the court.

[18] On the other hand, if the seat of the arbitration is not within the territorial jurisdiction of the court, and no other facts on which these proceedings are based exist or are alleged to have occurred, then the court would not have the necessary jurisdiction to try or adjudicate on a matter in relation to that arbitration.

[19] The applicant's position was that the seat of the arbitration was moved to London by consent of the parties and pursuant thereto this court no longer has jurisdiction over the arbitration proceedings and in particular the respondent's application to set aside the partial award made in respect of the arbitration (encl. (1)).

[20] The respondent on the other hand asserted that the seat of the arbitration was in Kuala Lumpur and remained in Kuala Lumpur and as such the partial award is deemed to have been made in Kuala Lumpur. Consequently this court would have the necessary jurisdiction under s. 23(1)(a) and/or (c) of the CJA in that the cause of action had arisen within its jurisdiction and/or the facts of the dispute exist or occurred within its jurisdiction.

[21] As stated earlier, whether this court has the jurisdiction to hear the respondent's originating motion (encl. 1) depends very much on whether the seat of arbitration is in Kuala Lumpur or whether it has shifted to London.

Seat of Arbitration

[22] The significance of the "seat of arbitration" in determining the jurisdiction of the court to hear cases of this nature was clearly set out by Justice Cooke in *CVD* [2000] EWHC 154 (Comm) where he said:

> The significance of the "seat of arbitration" has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of arbitration.

[23] It is common ground:

(a) as stated earlier, that the seat of arbitration determines the jurisdiction of this court to hear cases of this nature;

(b) that the seat of arbitration does not necessarily mean the physical location of the arbitration or where the arbitration proceedings were held; and

(c) that at the time of the commencement of arbitration the seat of the arbitration was in Kuala Lumpur and the law governing the arbitration proceedings (ie, the curial law) was Malaysian law.

[24] It is also not in dispute that the PSC is governed by the laws of India (see art. 33.1 of the PSC) and that the arbitration agreement is governed by the laws of England. The arbitration agreement is contained in art. 34, and the relevant clause, cl. 34.12 reads, *inter alia*, as follows:

> Notwithstanding the provision of Article 33.1, **the Arbitration Agreement contained in this Article 34 shall be governed by the laws of England**. (emphasis added)

Applicant's Contention

[25] The applicant contended that the venue of the arbitration and with it the juridical seat of the arbitration had been shifted to London from Kuala Lumpur by consent of the parties and in support thereof the applicant referred to the facts surrounding the arbitration proceedings which, according to the applicant, from the records are clear and undisputable.

[26] They are as follows:

(a) After the arbitral tribunal was constituted, the arbitral tribunal had, on or about 28 March 2003, fixed a tentative preliminary meeting of the arbitration to be held in Kuala Lumpur in the week beginning 19 May 2003.

(b) This preliminary meeting was adjourned tentatively to a date between 25 June 2003 to 5 July 2003 at the request of the applicant's counsel. In agreeing to this request for adjournment by the applicant's counsel, the arbitral tribunal also stated that the arbitration ought not to be heard in Kuala Lumpur due to the SARS scare at the time and after considering the views of the parties, held that the preliminary meeting would take place in Amsterdam.

(c) On 30 June 2003, the preliminary meeting of the arbitration was held in Amsterdam and directions in respect of the conduct of the arbitration were given.

(d) Subsequent hearings and proceedings of the arbitration were held in London and were listed as follows:

(i) The respondent's application for interim relief was fixed for hearing on 26 September 2003 in London (see notice dated 16 August 2003 in exh. KKD4);

(ii) Further case management of the arbitration was fixed on 12 December 2003 in London (see Order for Directions dated 19 August 2003 in exh. KKD4).

(e) Subsequently, by way of a consent order dated 15 November 2003, (the consent order) the arbitral tribunal ordered that, by consent of the parties, the seat of the arbitration be shifted to London. (see the consent order in exh. KKD5).

(f) After this consent order was made, evidence was led by the parties in arbitration hearings between 3 June 2004 and 9 June 2004 in London and between 20 July 2004 and 26 July 2004, the arbitral tribunal heard oral arguments, also in London.

(g) The respondent then filed its written submissions on 15 September 2004 and the applicant filed its written submissions on 5 November 2004.

[27] After taking into consideration all the evidence, arguments and submissions, the arbitral tribunal delivered the partial award dated 31 March 2005.

[28] Based on the above facts, it was the applicant's view that as a result of the consent order the juridical seat of the arbitration was shifted from Kuala Lumpur to London. In support of this view the applicant advanced three grounds:

(i) Section 3 of the English Arbitration Act 1996;

(ii) Amendment of the arbitration agreement under art. 34.12 of the PSC; and

(iii) Estoppel.

Section 3 Of The English Arbitration Act 1996

[29] As art. 34.12 the arbitration agreement is governed by English law, the question of whether the seat of arbitration has shifted from Kuala Lumpur to London ought accordingly be decided by English law.

[30] In this regard s. 3 of the English Arbitration Act 1996 expressly provides as follows:

> 3. The seat of the arbitration
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> In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated:
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> (a) **by the parties to the Arbitration Agreement**, or
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> (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
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> (c) **by the arbitral tribunal if so authorized by the parties**, or determined, in the absence of any such designation, having regard to the parties' agreement, and all the relevant circumstances. (emphasis added)

[31] Based on the above provision, the applicant submitted that the order dated 15 November 2003 is a record of the consent of the parties to shift the seat of the arbitration to London and is

A therefore a valid designation of the seat of the arbitration by the parties under the arbitration agreement as provided under s. 3(a) and 3(c) of the abovesaid Act.

[32] According to the applicant, that English law allows parties B to change the seat of arbitration by the mechanism envisaged in s. 3 of the abovesaid Act was reflected in the case of *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc* [2006] 1 QBD 65. (*Dubai Islamic Bank PJSC*).

C *Amendment Of The Arbitration Agreement Under Art. 34.12 Of The PSC*

[33] Article 34.12 of the PSC reads as follows:

> 34.12 **Venue and Law of Arbitration Agreement**
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> D The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, **unless the Parties otherwise agree**, shall be Kuala Lumpur Malaysia, and shall be conducted in the English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation E of arbitral proceedings and any pending claim or dispute. Notwithstanding the provision of Article 33.1, **the Arbitration Agreement contained in this Article 34 shall be governed by the laws of England**. (emphasis added)

[34] The applicant is relying on the above article specifically the F phrase "unless the parties otherwise agree" to argue that the parties (to the arbitration agreement) has agreed *vide* the consent order to amend the arbitration agreement to provide for the venue (or seat) of the arbitration to be in London instead of Kuala Lumpur. In other words, the consent order constitutes an G agreement in writing between the parties which had the effect of amending the (arbitration) agreement between the parties.

[35] The following authorities were cited in support of the above proposition:

H (i) the Federal Court case of *Chong Fook Kam & Anor v. Shaaban & Ors* [1970] 1 LNS 16;

(ii) *Wilding v. Sanderson* [1897] 2 Ch 534 (*Wilding v. Sanderson*); and

I (iii) *Kinch v. Walcott & Ors* [1929] AC 482. (Privy Council).

[36] In this regard it was also the applicant's argument that it is a settled principle of English law (ie, the law governing the arbitration agreement) and international commercial arbitration, that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part of.

[37] The applicant referred to s. 7 of the English Arbitration Act 1996 as well as art. 21.2 of the UNCITRAL Rules both of which state as follows:

> Section 7 of the English Arbitration Act 1996 stipulates that:
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> Unless otherwise agreed by the parties, an Arbitration Agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and **it shall for that purpose be treated as a distinct agreement**.
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> **Article 21.2 of the UNCITRAL Rules**
>
> **an arbitration clause** which forms part of a contract and which provides for arbitration under those Rules **shall be treated as an agreement independent of the other terms of the contract**. (emphasis added)

[38] It would appear from the above provisions that the primary or main contract concerns the commercial obligations of the parties, whilst the secondary or collateral contract contains the obligations to resolve any disputes arising from the commercial relationship by arbitration. The arbitration agreement is thus in the applicant's view a separate and distinct agreement providing for its own procedure for amendment, which in this case is contained in art. 34.12 of the PSC. This procedure according to the applicant is separate and distinct from the procedure for amending the remaining articles of the PSC as set out in art. 35.2 of the PSC.

[39] Thus in the applicant's view the term "unless the parties otherwise agree" in art. 34.12 of the PSC enabled the parties to the dispute or arbitration to change the juridical seat of the arbitration. Such a change did not require an amendment to the terms of the PSC itself as required by art. 35.2. Under art. 35.2 any amendment to the terms of PSC would require the consent of all parties to the PSC.

[40] However the applicant point to the difference in the words used in art. 35.2 and art. 34.12 in that the former uses the words "all the parties" whereas the latter uses "the parties". This distinction in wording according to the applicant is intentional as the words "parties" in art. 34.12 refers to parties to the dispute/arbitration and not parties to the PSC. Such a reading according to the applicant is consistent with the rest of the provisions in art. 33.4. As the arbitration agreement is a separate agreement it has to be interpreted independently of the underlying contract.

[41] In this regard, as the shift of seat does not alter the terms of art. 34.12, art. 35.2 is therefore inapplicable or irrelevant. Consequently art. 299 of the Indian Federal Constitution is also inapplicable.

Estoppel

[42] It was contended by the applicant that by participating in the arbitration proceedings after the consent order was made and sharing in the costs of the arbitration without protest or comment, the respondent was estopped by their conduct from denying that they had agreed to shift the seat of the arbitration to London. Reference was made to the case of *Toh Seak Keng v. Lim Huang Cheow & Ors, Toh Seow Ngan & Ors As Interveners; & Another Case* [1989] 2 CLJ 511; [1989] 2 CLJ (Rep) 580 (*Toh Seak Keng*) where VC George J applied the principles in respect of estoppel by conduct set out by the Privy Council in *Abuakwa v. Adanse* [1957] 3 All ER 559 (*Abuakwa v. Adanse*) when he held that the plaintiff in that suit was estopped by their previous conduct from challenging the validity of the consent order. In addition, contended the applicant, by participating fully in the arbitration proceedings until the award was finally rendered as 31 March 2005 without any comment or protest to the consent order, the respondent had effectively led the applicant and the arbitral tribunal to believe that they had consented to seat of the arbitration the seat of the arbitration being shifted had been shifted to London. Consequently it is not open to the respondent to now contend that the seat of the arbitration was not validly shifted to London.

[43] For this contention, the applicant referred to the landmark decision of the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 (*Boustead Trading*) in particular Gopal Sri Ram JCA's (as he then was) judgment on the doctrine of estoppel.

[44] In further support of their contention that the respondent is estopped by their conduct from denying that the seat had been shifted to London, the applicant referred to the respondent's application to the arbitral tribunal in Arbitration case No. 2 for an interpretation of the award under the English Arbitration Act 1996. By doing so, contended the applicant, the respondent had conceded that the curial law of the Arbitration Case No. 2 was English law as the seat of arbitration had been shifted to London. (see exh. KKD8).

[45] It must be pointed out by way of background, that two other arbitrations were held between the respondent and the applicant under the PSC.

[46] The arbitration which is the subject matter of the present proceedings is Arbitration Case No. 3 of 2003. The other two arbitrations between the respondent and the applicant were referred to as Arbitration Case No. 1 and 2 of 2003 respectively and the seats of these two arbitration were also shifted to London by consent of the parties. (see exh. KKD7 - the orders dated 14 November 2003 and 15 November 2003 for Arbitration Case No. 1 and 2 of 2003 respectively).

[47] It was the applicant's case that as with the consent order governing the present arbitration proceedings, the respondent did not object to the orders dated 14 November 2003 and 15 November 2003 in respect of Arbitration Case No. 1 and 2 of 2003.

[48] In the final analysis and in view of the fact that the arbitration agreement was governed by the laws of England and the seat of arbitration was in London, it was the applicant's submission that the law which will apply to the filing of the arbitral award, to its enforcement and to its setting aside or other challenges would be the laws of England, ie, the English Arbitration Act 1996. By reason thereof any challenge to the partial award dated 31 March 2005 must necessarily be filed before the competent courts in England.

[49] It was the applicant submission therefore that in light of the clear provision of art. 34.12 of the PSC, encl. (1) ought to be set aside.

The Respondent's Contention

[50] On the applicant's first ground, ie, the applicability of s. 3 of the English Arbitration Act 1996, the respondent's position on this ground was that the English Arbitration Act 1996 did not apply for the purpose of determining whether the seat of arbitration had shifted to London from Kuala Lumpur. The respondent was of the opinion that the fact that the arbitration agreement was governed by English law was immaterial as far as this issue was concerned. The respondent's contention was premised on the following:

(a) as Kuala Lumpur had been expressly designated as the juridical seat of the arbitration, the curial law follows the seat;

(b) since the juridical seat has been designated expressly in the agreement itself by the parties, the question of determining the seat under s. 3 of the English Arbitration Act 1996 did not arise. The role of the (arbitral) tribunal would only arise when parties failed to designate a juridical seat in the arbitration agreement itself, which was not the case here.

[51] In this regard, it was the respondent's submission that although a few of the arbitration hearings were held in London and the partial award itself was signed in London, the contractual *situs* of arbitration or the seat of the arbitration continued to be Kuala Lumpur. Thus the partial award, which was passed in London ought be deemed to be passed in Kuala Lumpur as the juridical seat. Kuala Lumpur remained the juridical seat as it was specifically and expressly designated to be so in the PSC. The change in the venue from Kuala Lumpur to London was, according to the respondent, merely for the sake of convenience due to the SARS outbreak which explained why the respondent agreed to the change. Therefore, what was clearly intended and agreed to was a shift of the **physical seat** as opposed to a **legal seat**. (emphasis added).

[52] The respondent further submitted that the legal seat or juridical *situs* should be constant regardless of where the arbitration may be conducted. The "juridical *situs*", the respondent reiterated is a concept independent of the places where various hearings or other parts of the arbitral proceedings occurred and which may not be the same.

[53] As far as the respondent is concerned regardless of where the (partial) award was passed or deemed to have seen passed, the fundamental question is whether Kuala Lumpur was the legal seat and in the respondent's view Kuala Lumpur had always been the legal seat.

[54] In support of their contention, the respondent referred to the following authorities

(i) *Dubai Islamic Bank PJSC* (*supra*);

(ii) *Russell on Arbitration* (22nd edn.) at p. 73;

(iii) *Union of India v. McDonnell Douglas* [1993] 2 Lloyd's Rep 48;

(iv) *Naviera Amazonica Peruana SA v. Compania Internacional De Seguros De Peru* [1988] 1 Lloyd's Rep 116 at pp. 119 and 120;

(v) *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission* [1994] 1 Llyod's Rep 45 at p. 57 (*Sumitomo*).

[55] As for the issue of estoppel (which is the applicant's second ground) the gist of the respondent's argument was that the reason why they did not challenge the consent order was because they have always understood that the consent order was merely to record the consent of the parties to the arbitral tribunal's proposal to shift the physical seat of arbitration to London in the light of the SARS outbreak. The respondent maintained that they never intended and never understood the consent order to mean that the juridical *situs* had been shifted from Kuala Lumpur to London otherwise they would have raised an objection.

[56] Further the juridical *situs* of the arbitration could not be construed as having been shifted to London because, quite apart from the circumstances under which the shift was made the following facts have to be considered:

(a) Kuala Lumpur was originally chosen as the neutral venue; and

(b) the alteration of the legal seat can only be done *vide* an instrument in writing.

[57] On (a) the choice of Kuala Lumpur as a neutral venue, according to the respondent, Kuala Lumpur was chosen as the contractual venue of arbitration in the PSC as the parties intended to have a neutral venue as none of the contracting parties were from Malaysia.

[58] The respondent contended that they would never have agreed for London to be chosen as a venue (for arbitration) as one of the contracting parties Cairn Energy India Pty Ltd (Cairn Energy), has a connection with UK through its UK parent company. The basic principle of neutrality of venue maintained by the parties to the PSC would have been defeated had London been accepted.

[59] The respondent further pointed out that as the PSC is an international contract containing an international arbitration clause, the choice of a neutral venue was imperative.

[60] In support of its contention, the following academic commentaries and cases were referred to:

(i) *Russell on Arbitration* (22nd edn.) by Sutton and Gill at p. 9;

(ii) *Law and Practice of Commercial Arbitration* (4th edn.) by Redfern and Hunter at p. 78;

(iii) *Karaha Bodas Co LLC v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (No. 2)* [2003] 4 HKC 488;

(iv) *Sumitomo* (*supra*);

(v) *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446; and

(vi) *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation* [1981] 1 All ER 289.

[61] In light of the above authorities, the respondent submitted that the consent order cannot therefore be construed to contravene the principle of neutrality of venue of arbitration as envisaged by the parties in art. 34.12 as to do so would destroy the fundamental character of this international arbitration.

[62] As for (b) that the alteration of the legal seat can only be done *vide* an instrument in writing, this is actually the applicant's third ground in support of their contention that the seat has been shifted to London. Very briefly the respondent's argument is that there was no written agreement by the parties agreeing to change the contractually designated venue. The consent order was merely to record the parties' consent to have the physical sittings in London, not to record the parties' agreement to change the arbitration seat to London.

[63] Alternatively, the respondent argued that even assuming there was an *ad hoc* agreement, the agreement was null and void. The basis for this contention is that the officer representing the respondent at the arbitration proceedings must by virtue of art. 299 of the Indian Constitution act within the scope of his authority otherwise his act in agreeing to the shift in the juridical seat to London would not bind the respondent. In such circumstances, estoppel would not apply.

[64] For the above reasons, the respondent alleged that the applicant's contention that the respondent was estopped from denying there was a shift in the physical seat to London from Kuala Lumpur was baseless. In any event the respondent was of the view that there was no *consensus ad idem* between the parties to shift the juridical seat of the arbitration.

[65] Finally the respondent argued that in order for a particular conduct or representation to give rise to an estoppel, the said conduct or representation had to be clear and unequivocal (see *Peyman v. Lanjani And Others* [1984] 3 All ER 703; *Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd* [1990] 2 CLJ 913; [1990] CLJ (Rep) 15; [1990] 3 MLJ 287, and *Hong Leong Leasing Sdn Bhd v. Tan Kim Cheong* [1993] 1 LNS 110; [1994] 1 MLJ 177).

[66] The respondent's conduct did not indicate in any way that it had acquiesced to the juridical *situs* being shifted to London. Rather, claimed the respondent, their conduct was merely consistent with the fact that the physical venue of the arbitration had been shifted. Hence, the allegation that the respondent's conduct or representation had given rise to an estoppel was without merit.

[67] As regards the applicant's third ground, ie, amendment of the arbitration agreement under art. 34.12 of the PSC (which was adverted to earlier) the respondent submitted that any agreement to alter the legal seat of arbitration must be made in writing signed by the parties for two reasons:

(a) the mandatory requirements of art. 299 of the Constitution of India;

(b) article 35.2 of the PSC.

The Mandatory Requirements Of Art. 299 Of The Constitution Of India

[68] Article 299 provides that all contracts made in the exercise of the executive power of the Union (of India) or of a state shall be expressed to be made by the President, or by the governor of the state, as the case may be, and all such contracts made in the exercise of that power shall be executed on behalf of the President or the governor by such persons and in such manner as he may direct or authorise.

[69] Thus by virtue of art. 299, three conditions must be satisfied before an alteration of the legal seat of arbitration (which, according to the respondent, amounts to a contractual agreement) can be valid and binding on the respondent:

(a) the contract must be expressed to be made by the President or the governor;

(b) it must be exercised in writing; and

(c) the execution thereof must be by such person and in such manner as the President may direct or authorise.

(see *State of Haryana v. Lal Chand & Ors* [1984] 3 SCR 715).

[70] These conditions are mandatory, contravention of which would nullify the agreement and render it void. (see the Indian Supreme Court decision of *Mulamchand v. State of Madhya Pradesh* AIR 1968 SC 1218).

[71] In the light of the above proposition, the applicant's contention that the consent order gave rise to a valid agreement to alter the legal seat of arbitration would, in the respondent's view, contravene art. 299 and also art. 35.2 of the PSC as the consent order was neither signed in the presence of the joint secretary, nor did the respondent's lawyer have the power and authority to enter into an agreement on the respondent's behalf to shift the legal seat of arbitration.

Article 35.2 Of The PSC

[72] The respondent's position on this issue is that art. 34.12 which stipulates Kuala Lumpur as the juridical seat of arbitration had not been amended in the manner contemplated by art. 35.2 of the PSC.

[73] Article 35.2 of the PSC reads as follows: A

> This contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective.

B

[74] Based on the above provision, the respondent contended that the juridical seat may only be effectively changed by an instrument in writing signed by all parties (ie, all parties to the PSC) and not in the way of the consent order unsigned by all the parties. C

[75] Hence, the respondent surmised that as the arbitration agreement in art. 34 was not modified, varied or amended in the manner set out in art. 35.7, the juridical seat of the arbitration continued to remain in Kuala Lumpur. D

[76] As regards the applicant's contention that the formal requirements of art. 35.2 of the PSC do not apply to the arbitration clause in art. 34.12 on the ground that the arbitration agreement is regarded as a separate and distinct agreement, the respondent was of the view that whilst the arbitration agreement is regarded as separate from the underlying contract, it cannot be regarded as a wholly distinct and independent agreement. The arbitration agreement is separable from the underlying contract only in the sense that it would survive and continue to be in force in the event that the underlying contract was found to have been invalid or had been terminated or frustrated. It cannot go so far as to say that the other provision of the underlying contract do not apply to it. E F

[77] In the premises, it was the respondent's submission that art. 35.2 of the PSC would apply to the arbitration agreement in art. 34 (including art. 34.12). Hence the words "unless the parties otherwise agree" in art. 34.12 must be construed to have the meaning of an enabling provision, enabling the parties to agree to a place other then Kuala Lumpur as its juridical seat but this change however must be in accordance with the provisions of art. 35.2. Thus to validly and effectively change the original venue, it must be "by and instrument in writing signed by all the parties", as required under art. 35.2. G H I

[78] To sum up the respondent submitted as follows:

(a) the seat of the arbitration was agreed in art. 34.12 to be in Kuala Lumpur, a fact which the applicant had admitted;

(b) as illustrated above, the seat had not been subsequently altered, or validly altered by agreement of all the parties or otherwise;

(c) as the seat of arbitration remained in Kuala Lumpur, this court would have the supervisory jurisdiction over the partial award and as such the jurisdiction to hear the respondent's originating motion in encl. (1).

Decision

[79] I have considered the applicant's and respondent's submission as presented above and the parties' oral submission and at the end of the hearing I made the following decision:

(i) That based on the Consent Order of 15.11.2003, the juridical seat of the arbitration has as a matter of fact been shifted to London from Kuala Lumpur;

(ii) As the juridical seat has been shifted to London from Kuala Lumpur by virtue of Section 23 CJA this Court does not have jurisdiction over the Partial Award sought to be impugned by the Applicant/Respondent; and

(iii) By virtue of Order 69 rule 5 RHC 1980, the order dated 29/2/2005 ought to be set aside as the arbitration proceedings were held in London and not in Kuala Lumpur. Therefore even if it is argued that the seat of arbitration remains in Kuala Lumpur, Applicant would not be able to serve the Originating Motion out of jurisdiction as no arbitration proceedings have been held in Malaysia. For the above reasons, and other reasons submitted by the Respondent, the Respondents application as per Enclosure (9) is allowed with costs.

(In my oral decision above, the applicant refers to the Government of India and the respondent, Petrocon India Limited).

[80] As stated above, in order to decide whether or not the respondent's application in encl. (1) ought to be set aside on the ground of the lack of jurisdiction of this court to hear the application, it is necessary for the court to determine whether the seat of arbitration has in fact been shifted to London (from Kuala Lumpur).

[81] As agreed by both parties the seat of arbitration will determine the curial law ie, the law governing the arbitration proceedings. Thus any challenges to the partial award such as that mounted by the respondent *vide* encl. (1) must accordingly be filed in the court of competent jurisdiction. As stated earlier both parties do not dispute that the jurisdiction of this court to hear civil proceedings is provided for in s. 23 of the CJA, specifically s. 23(1)(a) and (c) of the CJA.

[82] The point in dispute between both parties is the seat of arbitration, whether it has shifted to London as contended by the applicant or whether it continued to remain in Kuala Lumpur as maintained by the respondent.

[83] In this regard I am in agreement with the applicant that as the law governing the arbitration agreement is English law (as accepted by the respondent) and as contained in art. 34.12 (*supra*), the issue of whether the seat of arbitration had been shifted to London ought to be decided in accordance with English law.

[84] It is true and it is not disputed by the applicant that at the time the PSC was entered into, the venue or seat of arbitration had been agreed to be at Kuala Lumpur. This was reflected in art. 34.12 of the PSC which stipulates that "The venue of sole expert, conciliation or arbitration proceedings pursuant to this article, **unless the parties otherwise agree**, shall be Kuala Lumpur Malaysia …". (emphasis added)

[85] However as submitted by the applicant based on the facts as narrated at pp. 3-4 of this judgment, which as said earlier were largely undisputed, the seat of arbitration was subsequently, with the agreement of all parties to the arbitration, shifted to London.

[86] This agreement, as submitted by the applicant, was recorded in the form of a written consent order of the arbitral tribunal on 15 November 2003 (referred to in this judgment as the consent order) which, according to the applicant, would satisfy the requirements of s. 3 of the English Arbitration Act 1996. Section 3 of the English Arbitration Act 1996 is reproduced below for ease of reference:

> 3. In this Part "the seat of arbitration" means **the juridical seat of the arbitration designated**:
>
> (a) **by the parties to the Arbitration Agreement**; or

A (b) by any arbitral or other institution or person vested by the parties with powers in that regard; or

(c) **by the arbitral tribunal if so authorized by the parties**. (emphasis added)

B **[87]** The terms of the consent order can be seen in exh. KKD5.

[88] As the consent order is at significance to the issue at hand, it is perhaps necessary that it be reproduced in full and I append C below the full text of the consent order:

IN THE MATTER OF ARBITRATION BETWEEN:

Petrocon India Ltd. ... Claimant

D AND

The Ministry of Petroleum
and Natural Gas and Anr ... Respondents

PRESENT:

E Mr P Chidambaram, Sr Advocate
Mrs Pallavi Shroff, Advocate
Mr Siddhartha Datta, Advocate
Mr Kuldeep Drabu, Director Petrocon ... For The Claimants

F Mr Harish Salve, Sr Advocate
Mr R Sasi Prabhu, Advocate
Mr Sanjoy Joshi, Director MOP&G
Mr Ashok Kumar, Deputy Chief
Legal Adviser Hydrocarbons,
Ms Pomila Jaspal, Chief Manager (Finance)
G Dr AK Dhawan, Chief Manager (reservoir) ... For The Respondents

ORDER
[15.11.2003]

By consent of parties seat of the Arbitration is shifted to London.

H Parties will deposit Rs. 25000 each as administrative costs with the Presiding Arbitrator.

sgd	sgd	sgd
J.K Mehra	G.T Nanavati	B.N Kirpal
I Arbitrator	Arbitrator	Presiding Arbitrator

(emphasis added)

[89] It is very clear from the abovesaid order that the order is to record the consent of the parties to shift the seat of the arbitration to London. Such an order is in line with the requirements of s. 3(a) and (c) of the English Arbitration Act 1996 which is the governing law of the arbitration agreement.

[90] The courts in England have recognised that parties to an arbitration agreement may change their seat of arbitration *via* the mechanism laid down in s. 3 above. In the case of *Dubai Islamic Bank PJSC* (*supra*), the court held that:

> under English law an arbitration must have a seat; once an arbitration started and it had a seat it could not be changed unless it was by one of the mechanisms envisaged in s. 3; it would be contrary to the whole idea of a juridical seat if its location should somehow be peripatetic; and the procedural law regime of an arbitration could not change capriciously from one point in the arbitral process to the next; and if the particular mechanisms identified in s. 3 were not used, then once a seat had been identified it could not move.

[91] I would also agree with the applicant that as it is not disputed that the arbitration agreement is governed by English law, it would only be logical that English law be invoked to determine whether or not the seat of the arbitration has been changed. To say that in determining this issue it was immaterial that the governing law was English law as suggested by the respondent would be absurd as quite clearly the court could not apply Malaysian or Indian law to decide on this issue.

[92] Thus based on the consent order and by virtue of s. 3 of the English Arbitration Act 1996 the parties hereto ie, the applicant and the respondent appeared to have agreed to change the seat of the arbitration from Kuala Lumpur to London.

[93] The next question that arises in relation to the consent order is whether parties have actually agreed to change the seat in the juridical sense or whether the agreement as recorded was only for a physical change of the seat with the juridical seat of arbitration remaining intact in Kuala Lumpur.

[94] This question can only be answered by looking at the proceedings leading to the consent order of the respondent and to see whether the conduct of the respondent during those proceedings would estop the respondent from denying that they had agreed to shift the juridical seat of arbitration to London. The

respondent had argued at length that what was agreed upon by them was only to a shift of the physical seat of the arbitration to London due to the SARS outbreak in Kuala Lumpur at the material time. The respondent contended that they had understood the words the "seat of the arbitration is shifted to London" in the consent order in the same way when sittings were held in India and Amsterdam prior to 15 November 2003 (ie, the date of the consent order) as the respondent never agreed to change the status of Kuala Lumpur as the designated venue of the arbitration. The respondent further referred to the consent order as a record of proceedings which "merely records that the parties orally consented to the oral proposal of the arbitral tribunal to hold the hearing at London ie, for shifting the physical seat of arbitration to London." (see para. 4(xvi) of the respondent's affidavit in reply (2)). The respondent went on to state that there was no intention or their part to change the legal seat or juridical seat of the arbitration to London.

[95] However as submitted by learned counsel for the applicant, it is difficult for this court to accept that the respondent was unaware of the implications of the consent order as the order had explicitly state "By consent of parties **seat of the arbitration is shifted to London**". (emphasis added). If the respondent had understood the order to mean only that parties agree to hold the hearing in London in the same way as the previous sittings held in India and Amsterdam, there would be no necessity for a consent order to be drawn up stating that the seat of arbitration has been shifted to London.

[96] I agree with the applicant that the fact that the consent order referred to the word "seat" would indicate that the intention of the parties was to move the juridical *situs* or juridical seat of the arbitration. If the intention was merely for hearings to be held in London without affecting the juridical status of the arbitration, the word "seat" would not have been used in the consent order.

[97] I would also agree with the applicant the arbitral tribunal which was made up of three eminent retired judges would have been fully aware of the effect and meaning of the words "consent order", "seat" and "shifted". Similarly with the respondent who was advised by counsel at all times.

[98] Furthermore as correctly put by learned counsel for the applicant if the respondent clearly did not intend or had not agreed to shift the seat to London, then it should have either

applied to have the word "consent" deleted from the order or file an application to set aside the order. The respondent did neither. Instead, as the facts (undisputed) would bear out, the respondent participated fully in the arbitration proceedings and shared in the costs without protest or comment. As pointed out by the applicant, it is significant to note that the respondent failed to make any protest or comment about the fact that the consent order stated that the seat of the arbitration had been shifted to London, during the arbitration hearings or at any material time. From their conduct as outlined above, the respondent was estopped from denying that they had agreed to shift the seat of arbitration to London or that they did not understand what the order means or signify. (see the case of *Toh Seak Keng* and the Privy Council decision of *Abuakwa v. Adanse*, referred to earlier).

[99] Further the respondent by participating fully in the arbitration proceedings without any comment or protest whatsoever to the consent order had clearly caused the applicant to believe that the seat of the arbitration had been shifted to London. (see *Boustead Trading* (*supra*))

[100] As for the numerous references by the respondent to various authorities on the distinction between the seat of arbitration and the fact that arbitral meetings and hearings may be held away from, or out of its legal seat, again as pointed out by the applicant this was not an issue because both parties accept as a matter of law that the seat of arbitration or juridical *situs* is independent of the various places where the arbitration hearings were held and may not be the same. However the fact is that in the present case by virtue of the consent order and s. 3 of the English Arbitration Act 1996 the legal seat of the arbitration has been shifted to London.

[101] Thus the respondent's contention that regardless of the fact that a few of the arbitration hearings were held in London and the partial award itself was signed in London, the partial award ought to be deemed to be passed in Kuala Lumpur as the juridical seat, cannot be accepted.

[102] The next issue relates to art. 34.12 of the PSC. As been earlier, the applicant had relied on the words "unless the parties otherwise agrees" in art. 34.12 in support of its argument that the consent order constituted an agreement by both parties to change the seat of arbitration to London as provided for under art. 34.12.

[103] The respondent on the other hand maintained that art. 34.12 had not been amended in the manner contemplated by art. 35.2 of the PSC. The respondent contended that because there are five parties to the PSC and the arbitration agreement it was legally impossible to amend the same by two out of five parties, as according to the respondent, it is settled law that to set aside an agreement by another agreement all the parties to the first agreement (ie, the PSC itself) must be parties to the new agreement.

[104] The applicant disagreed with this contention for the following reasons:

(a) the respondents position that all five parties must agree on the change of seat is impractical and absurd as the arbitration in respect of which the partial award was made concerned only the two parties to the arbitration. It did not concern the other three parties to the PSC and therefore would not be binding on the other parties;

(b) the arbitration agreement is a separate and distinct contract which may provide for its own procedure for amendment.

(c) article 35.2 uses the words "all the parties" whereas art. 34.12 uses "the parties".

[105] To fully appreciate both parties arguments perhaps it is necessary to reproduce again arts. 34.12 and 35.2:

> 34.12 **Venue and Law of Arbitration Agreement**
>
> The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, **unless the Parties** otherwise agree; shall be in Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the Arbitration Agreement contained in this Article 34 shall be governed by the laws of England.
>
> 35.2 **Amendment**
>
> This Contract shall not be amended, modified, varied or supplemented in any respect **except by an instrument in writing** signed by **all the Parties**, which state the date upon which the amendment or modification shall become effective. (emphasis added)

[106] Having examined closely the above said provisions I am inclined to agree with the applicant's submission that the respondent's argument that an amendment of the arbitration agreement would have to follow the procedure set out in art. 35.2 of the PSC is flawed and inconsistent with the provision of the arbitration agreement as contained in art. 34.12 of the PSC.

[107] Firstly, it is trite and agreed by both parties that the arbitration agreement is a separate and distinct contract which has to be construed independently of the underlying contract. In *Heyman v. Darwins Ltd* [1942] AC 356, a House of Lords decision, Viscount Simon LC said:

> **An arbitration clause** is a written submission, agreed to by the parties to the contract, and, like other written submission to arbitration, **must be construed according to its language and in the light of the circumstances in which it is made**. (emphasis added)

[108] This principle is embodied in s. 7 of the English Arbitration Act 1996 (*supra*), which is the law applicable to the arbitration agreement. It is also incorporated in art. 21.2 of the UNCITRAL Rule (*supra*) (see art. 34.9 which provides for the application of the UNCITRAL Rules to the arbitration proceedings).

[109] It is therefore clear from the above that an arbitration agreement is a separate and distinct agreement which may provide for its own procedure for amendment. The procedure of amendment in the present case, is clearly provided in art. 34.12 of the PSC which states:

> the venue of sole expert, conciliation or arbitration proceeding pursuant to this Article, unless the Parties otherwise agree shall be Kuala Lumpur, Malaysia.

[110] This procedure is distinct and separate from the procedure for amending the rest of the articles of the PSC. By stipulating the term "unless the parties otherwise agree" art. 34.12 provides a mechanism or procedure whereby the parties to an arbitration can agree to change the juridical seat of arbitration.

[111] In other words it was to enable parties to an arbitration to agree to change the juridical seat from that stipulated in the arbitration agreement which is Kuala Lumpur.

[112] It is not an amendment of the terms of the PSC itself and as such art. 35.2 of the PSC did not apply. Article 35.2 would only apply if the terms of the PSC itself is being amended. This is apparent from the language used in art. 35.2 whereby the words 'all the parties' is used whereas in art. 34.12 the words used are "the parties".

[113] As submitted by the applicant, if "the parties" in art. 34 refer to all the five parties to the PSC as contended by the respondent there can never be an arbitration which involves less than five parties. As stated earlier, such a construction is impractical and absurd since all five parties must agree to a change of seat. The court in construing contracts must adopt a reasonable and common sense approach to avoid absurdity. Thus the word "parties" in art. 34.12 must necessarily refer to parties to the dispute or arbitration and not to parties to the PSC. Such a construction is also consistent with the rest of the provisions in art. 34 (see art. 34.1 - 34.13 which used the words "the parties" throughout).

[114] For the above reasons I was unable to agree with the respondent's contention that although the arbitration agreement is regarded as a separate from the underlying contract it cannot be regarded as a wholly distinct and independent agreement. As for the respondent's submission that there is no agreement in writing which would show a contrary intention other than what is stated in art. 34.12 that the venue of the arbitration shall be Kuala Lumpur, in my view the consent order constituted an agreement in writing between the parties which has the effect of amending the arbitration agreement between the parties. The consent order was signed by the arbitral tribunal and therefore there is no need for the parties to sign it as well.

[115] In the case of *Wilding v. Sanderson* the court held that a consent order is the formal result and expression of the agreement already arrived at between the parties to proceeding in an order of the court.

[116] In addition in view of the fact that the arbitration agreement is governed by English law as stated earlier s. 3 of the English Arbitration Act 1996 would applied. Therefore to my mind it is undisputable that a change in the seat of the arbitration by consent of the parties which consent was then recorded by the arbitral tribunal is a valid designation of the seat of the arbitration under s. 3(a) and s. 3(c) of the English Arbitration Act 1996.

[117] As art. 35.2 is not applicable, art. 299 of the Constitution of India is equally not applicable or relevant. Article 299 applies to contracts entered into by the Government of India (ie, the respondent) and which according to the respondent would require the express consent or authority of the President of India. However in this regard, I fully agree with the applicant that by their conduct in participating in the arbitration, the representatives and counsel of the applicant have demonstrated that they were fully authorised to agree to the consent order. Further there is no evidence in the affidavits of the respondent to say otherwise.

[118] In relation to this issue, as adverted to earlier in Arbitration Case No. 2 of 2003, the respondent had requested for an interpretation of the award dated 23 December 2004 made by the arbitral tribunal in that case, under arts. 35 and 37 of the UNCITRAL Rules and the English Arbitration Act 1996 (see exh. 'KKD8').

[119] In that case, an order similar to the consent order was made by the arbitral tribunal whereby the seat of the arbitration was also shifted to London. Not only had the respondent appear to have conceded that the curial law was English law but it would appear that the respondent have accepted the change of seat without the need for an agreement in writing by the respondent as purportedly required under art. 35.2.

[120] In the circumstances the respondent is estopped by its own conduct from denying that the seat of the arbitration has been shifted to London.

[121] It can be safely inferred from the facts as outlined above that the applicant was influenced by the respondent's conduct to believe that the respondent had agreed to the seat of the arbitration was shifted to London. It was therefore unconscionable and inequitable on the part of the respondent to question the validity of the consent order and to allege that the seat of the arbitration was not shifted to London when their conduct demonstrated otherwise.

[122] Similarly the respondent's submission that there was no *consensus ad idem* between the parties to shift the legal seat of the arbitration to London and therefore there was no proper variation of the seat must be rejected as the consent order clearly records that by consent of parties, the seat of the arbitration is shifted to London.

[123] The respondent also sought to rely on the principle of neutrality to contend that the consent order did not shift the juridical seat to London as this would offend the principle of neutrality which is an imperative in international arbitration agreements.

[124] I accept the submission of the applicant that neutrality is not a mandatory principle in the law relating to international arbitration. No evidence was adduced in the respondent's affidavit to show that Kuala Lumpur was chosen as the seat of the arbitration because of the neutrality principle. Further as contended by the applicant no party to the arbitration or the PSC is an English company. According to the applicant Cairn Energy's parent company is not an English company. It is a Scottish company based in Edinburgh. This fact was conceded to by counsel for the respondent in the course of his oral submission. It is not disputed that the English Arbitration Act 1996 does not extend to Scotland.

[125] Consequently the respondent's contention as regards the principle of neutrality in international arbitrations is without merit.

[126] To sum up, I find, for the reasons stated above that the seat of the arbitration has in fact been shifted to London from Kuala Lumpur. The curial law, ie, the law governing the arbitration proceedings would be the laws of England ie, the English Arbitration Act 1996. Thus any challenge to the partial award as being done by the applicant *vide* encl. (1) ought to be filed before the competent courts in England. (see *Sumitomo Heavy Industries v. ONGC Ltd and Others* [1998] 1 SCC 305; *Transocean Shipping Agency (P) Ltd v. Black Sea Shipping and Others* AIR 1998 SC 707; *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission*). This court by virtue of s. 23 of the CJA would not have any jurisdiction over the matter as it did not fall within either s. 23(1)(a) or (c) of the CJA.

[127] I did not deal with the issue of forum shopping as I did not consider it necessary for the purpose of determining the issue at hand ie, whether the seat of arbitration has been in fact been shifted to London.

[128] Finally as regards the applicant's contention on O. 69 r. 5 of the Rules of the High Court 1980 (RHC), O. 69 r. 5 of the RCH states as follows:

> 5. **Service out of the jurisdiction of summons, notice, etc. (O. 69 r. 5)**
>
> (1) Service out of the jurisdiction:
>
> (a) of an originating summons for the appointment of an arbitrator or umpire or for leave to enforce an award; or
>
> (b) of notice of an originating motion to remove an arbitrator or umpire or to remit or set aside an award; or
>
> (c) of any order made on such a summons or motion as aforesaid,
>
> is permissible with the leave of the Court provided that the arbitration to which the summons, motion or order relates is to be, or has been held within the jurisdiction. (emphasis added)

[129] Clearly from the above provision, leave to serve encl. (1) out of the jurisdiction is permissible only if the arbitration to which the originating motion relates is to be, or has been held within the jurisdiction of the court. It is undisputed that no arbitration proceedings were held in Kuala Lumpur.

[130] In this regard held is to be given its ordinary meaning and this means that the arbitration must have taken place in Malaysia before leave is permitted. See *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep 45.

[131] As such leave to serve encl. (1) out of the jurisdiction ought not to have been granted as the condition in the abovesaid order has not been satisfied. It was for this reason that I set aside the order date 29 February 2005 granting leave to serve encl. (1) on the applicant.

[132] Based on the reasons as stated above, I accordingly allowed the applicant's application as per encl. (9) with costs.